92-1853

NO._____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LITHO RANGE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WASHINGTON, D.C. 20543

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Suite 350, Courthouse Square Bldg.
310 Lakeside Avenue N.W.
Cleveland, Ohio 44113
(216) 523-1100

EDITOR'S NOTE

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QUESTIONS PRESENTED

I

Whether due process is denied an accused when the Court, without any expressed evaluation of the various alternative methods of qualifying evidence proffered under favor of Rule 801(d)(2)(E), rotely opts to preliminarily admit such proof pending a ruling as to admissibility at the close of the government's case.

II

Whether due process was denied when the Court admitted considerable hearsay evidence, which evidence did not satisfy the conditions precedent to admission required by Rule 801(d)(2)(E).

III

Whether due process was denied when the trial Judge refused to instruct the jury that evidence admitted under favor of Rule 801(d)(2)(E), could not be regarded as substantive proof of the petitioner's guilt of the conspiracy charge.

IV

Was the petitioner denied the right of confrontation when his counsel was denied the right to make effective use of the contents of a Motion to

Suppress the confession made by one of the government's chief witnesses, which contents would have tended to impeach the testimony of several government witnesses?

V

Was the evidence insufficient to support the defendant's conviction for the charged conspiracy (21 U.S.C. §846)?

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioner, Litho Range, respectfully prays that a Writ

of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals, which judgment became final on February 18, 1993 (see Appendix "A," at p. A-1) when a Petition for Rehearing *En Banc* (Appendix "B") was denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is set forth at Appendix "C", in the Appendix to this Petition, at p. A-24.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals was entered in the case of **United States v. Litho Range** on *December 23, 1992.* A Petition for Rehearing *en banc* was denied on *February 18, 1993.* The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 (3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES:

1. Fourteenth Amendment, United

States Constitution.

2. Fifth Amendment, U.S. Constitution.

3. Sixth Amendment, U.S. Constitution.

4. 21 U.S.C., §841[a] & [b].

5. 21 U.S.C., §846.

6. Rule 29, Federal Rules of Criminal Procedure.

7. Rule 104, Federal Rules of Evidence.

8. Rule 801(d)(2)(E), Federal Rules of Evidence.

STATEMENT OF THE CASE

I

Litho Range, the petitioner herein, and several others (including Eugene Ellington, a co-defendant at the trial and Jay Jackson, who became a witness) were charged in a thirteen (13) count indictment with various charges, including Drug Conspiracy (21 U.S.C., §846), Substantive Drug Offenses (21 U.S.C., §841[a] & [b]), and Money Laundering (18 U.S.C., §1956). Of

the five charges made against Litho Range in Counts 1, 2, 8, 12 and 13, he was only convicted of the Conspiracy charge in Count 1. Specifically Range was acquitted of the substantive drug offenses charged in counts 2 and 8, and of the money laundering charges made in counts 12 and 13 -- asserted violations of 18 U.S.C., §1956 (a)(1)(B)(i). The government's chief witness was one **Walter Grosser**, a paid government informant. In putting Grosser's testimony in its proper perspective, **DEA Agent Moritz**, readily testified Grosser had originally come to the Government and indicated he could "be of assistance to the Government" (Tr., 306). Additionally, he testified that while there were times when Grosser was not under surveillance when he entered Ellington's house, they would always have Grosser's vehicle, which would be "in front of the house[,] under surveillance" (id., 316).

Even more importantly, Grosser never had a conversation with Range that was recorded (id., 318 & 320). As to this, not surprisingly, since Moritz is a federal agent, he was unwilling to

concede even the obvious fact that the lack of a recording gave Grosser more leeway than would have been the case if the asserted conversations had been recorded (id., 318-319). Agent Moritz also made the critical concession here that "when the charges [in this case] were made against Mr. Range, they were made without the benefit of any contribution by Mr. Jackson"[1] (id., 325). This follows because, as the Record here shows, Jackson's evidence was not purchased by the Government until after he was arrested.

Back to Walter Grosser. Significant here, Grosser admitted he aggressively sought to cultivate a relationship with Ellington for the sole purpose of gaining his confidence in hopes he (Grosser) "could make a purchase from Litho Range" (Tr., 584). Indeed, Grosser likewise admitted he had, for purely mercenarious reasons, openly solicited the government to endorse this effort so that he could reap a personal profit from this venture (id., 511-

---

[1] Jay Jackson was one of the defendants in this indictment. Following the consummation of a plea bargain, Jackson, who was Ellington's nephew, testified for the government.

512).

Grosser also rather brazenly admitted that during his conversations with Ellington he "threw out ... a lot of people's names" (id., 512). His repeated use of the word Mafia (id., 513), he testified, was done intentionally so as to give Ellington the "impression" (ibid) that the people he was associated with "were heavy people" and that "they hurt people" (ibid).

Also, with reference to some of the contrived comments in the taped conversations that were played for the jury and with reference to other segments of Grosser's crafted testimony, the fact that he had purposefully introduced these names into many of these conversations (id., 516 & 519-520)[2] is a matter that surely must be reckoned with. In some of these instances Grosser stated his

---

[2] Agent Moritz had earlier brazenly testified to this precise point. Indeed he agreed to having orchestrated the things Grosser was suppose to work into his conversations with Ellington and others. The effect of this effort is that in its wake Grosser literally interrogated Ellington in quest of information that could incriminate Range. Stated another way, Ellington was actually transformed, albeit unwittingly, into a witness against Litho Range.

purpose was to try to verify things he had been told by other people.

Of no mean significance to the contentions urged below (--that is, that the "in furtherance" aspect of 801[d][2][E] was not satisfied before the formal admission of various taped conversations that contained conversational references to Litho Range) was Grosser's compelling testimony "that the Government would prime ... [him] on topics that ... [he was told to] steer the conversation to include" (id., 523). To this end, the Government actually gave him certain names to throw "into these various conversations" he fully intended to have with Ellington (id., 523). Most important here, Grosser actually boasted he was fully aware of "what was essential in the successful prosecution of a case" (id., 534).

On this point, the following segments of Walter Grosser's testimony is worth emphasizing:

> **Q.** So you tailored all your actions in a way to be of maximum assistance to

the government?

A. That's correct.

* * *

Q. Okay. Well, you do agree that a lot of the things that you testified involving Mr. Range occurred during times when you were not wearing a tape, I mean a microphone, a broadcast device; right?

A. Yes, that's correct.

* * *

Q. But when you testified that something happened and something was said during the conversation and there's no tape, the only proof that the government has to offer that occurred is your credibility.

A. Yeah, I guess you could say that.

* * *

Q. Right. And in order to decide that, we -- you understand, well, we need to know something about you because by your own admission you sell yourself to people as a person that you're really not; correct?

A. I've done that. Yes, I have.

Q. So we have to decide whether or not you're trying to sell the jury a bill of goods, don't we?

A. In your capacity, I guess you do.

(Tr. pp. 534-536.) (Emphasis supplied.)

Grosser also testified that Ellington -- not unlike himself, was "a name dropper" (id., 533) and that he "dropped Mr. Range's name quite a bit" (id., 533). To be sure, some of Ellington's references to Range were indisputably gratuitous. Others were, simply put, cleverly elicited from him. This is particularly so with reference to Ellington's statement that "he owed Mr. Range 185 or 180 some-odd thousand dollars...." (id., 533). As to this, Grosser conceded the ultimate point: Range never told him Ellington owed him any money (id., 534).

The position thus being urged is solidified by Grosser's clear-cut testimony that while he assertedly saw Range on Dibble Avenue on "at least three occasions" (id., 540), there were no

tapes made for "any [of the] time[s] when he [i.e., Range] was present" on the premises (id., 540). Even this is not all, by way of contrast with Grosser's earlier testimony (that when he would wear these wires, those working with him would be in the area [id., 542-544]) it is most significant that on none of the occasions when he asserts Range was supposedly on the premises, were any of the agents "in the area surveilling the house and the people coming and going" (id., 541). The upshot of this was, as Walter Grosser agreed, "the only proof we have [he] even saw Range there ... [was his] own testimony" (id., 541). Further, he conceded that being a salesman, he understood what "puffing" meant. Amplifying this thought Grosser testified:

> **Q.** ... [I]n other words, if you're going to sell me a car, a low-grade car, [and] you convince me it's better than a Mercedes or Lexus, that's puffing?
>
> **A.** Yes.

* * *

Q. If he [Ellington] tells you that Litho Range owes him 250,000 or 150,000, you don't know if he was puffing?

A. No, I don't.

* * *

Q. In your business, you testified here you traded on other people's names. You mentioned Virgil, something about "KB," or Kenneth Bradley, or to suggest you knew him. You were kind of trading on his name to add prestige to your reputation; is that right?

A. Right.

Q. How do you know when Genie Ellington was using the name Litho Range he wasn't trying to add prestige to his conversations and whatever it was he was doing? You don't know that, do you, of your own knowledge?

A. I can't prove it.

* * *

Q. Now, did the government tell you to insert into your conversations with

Ellington when you were riding around looking for Mr. Jackson that Litho Range wanted him killed and that Litho Range was a killer, or something to that effect? You recall constantly throwing his name in connection with violence in that conversation? You remember that, don't you?

A. I remember doing that, saying that, yeah. But it wasn't the government that had asked me to do that; it was from the previous conversation the day before.

Q. That was unrecorded?

A. That was unrecorded, right. I was trying to get it on the ... recorder.

Q. Now, ... it's true that ... invariably when Range's name would come into a conversation, you were milking it out of Genie?

A. Not all the time.

* * *

Q. Okay. But once the name Litho Range hits into the mix, then you were constantly trying to pick him?

A. Yes, that's true. Tr., 548-550. (Emphasis supplied.)

II

Some of the various statements inappropriately and improperly regarded by the Court (Tr., 916-918), as having been made in furtherance of the charged conspiracy, are included in the following selected segments of *Walter Grosser's* testimony:

(1) Ellington "told me that Litho was his partner and he was the one that was supplying him heroin that he sells. And he also stated that Litho had a bar on St. Clair, and a dry cleaners, and he said that he owed Litho $254,000, I believe it was". Tr., p. 416.

(2) On July 6, according to Grosser, Ellington told some unknown person that "he [Ellington] owes Litho $215,000 ... [s]o the guy had to give him his money ... Eugene Ellington told [him, i.e., Grosser, the witness] that Litho was going to bring a shipment of heroin that day." Id., 429.

(3) On July 22, Grosser testified he was again at Ellington's house and on this occasion "we talked about Litho selling cocaine, too. Id., 436.

(4) On August 19, Grosser says he was at Ellington's house. And that Ellington told him "Litho Range comes over every day and he picks up between 4

and $6,000. And this particular day he only had only $4,000 to give him." Id., 438.

(5) On October 10th (id., 452), Grosser testified, Ellington "was counting out his money that he was going to give Litho" (id., 453). Litho he says, then came to the house and Ellington and Range left his presence. When Ellington returned 15 minutes or so later, Grosser credited him with saying "Litho was mad because ... he [Ellington] had him out there digging (id., 454). According to Grosser, he had helped Ellington dig in the yard for what was supposed to be a search for some drugs that had been buried somewhere in the yard. Id., 453-454.

(6) On October 20, Grosser testified Ellington "told him that Litho had told him [Ellington] not to do such a big deal [i.e., the $100,000 transaction Grosser had talked to Ellington about], because only the police has that kind of money ..." Id., 465-466.

(7) In Exhibit No. 107 the taped conversation of July 13, 1971 (Tr., 434) the statement was made by Grosser to Ellington that a man named Virgil was telling him "that Litho was getting his stuff [i.e., drugs] from Butch before ... [Butch] got busted."

Following Ellington's denial that this was so, Ellington on this same tape added that "me and Litho went to Po Butch and told him the Feds was trying to get me [i.e., Ellington] to bust him." (ibid).

To this Ellington added the further comment that:

"me and Litho went to Po Butch, and he tried to give us some money. Litho says he don't want no money, he's just letting ... [him] know" (ibid).

(8) In Exhibit No. 109, a taped conversation of Grosser is heard saying Ellington: "Jay [Jackson] didn't given Litho all your money did he?" This statement came out of the blue and was not in response to anything said by Ellington and was totally ignored by Ellington (ibid). This was later followed up by Ellington's remarks heard on the tape: (a) "you think I'm lying, I owe that man [referring to Range], $182,000 ..." (ibid). And (b) "I'll sell this shit ... myself cause I owe the dude $182,000's man." Id., 442-444.

(9) In Exhibit No. 140, another taped conversation, Grosser (after being told by Ellington that "Litho" was "leery of Buddy" and believed that "Buddy was up with" the drug theft by Jackson) volunteered the egregious statement that if that were true "he wouldn't be here." This gross observation he punctuated by saying "if Litho kills you man [i.e., Ellington]" he would "talk to Jay" himself. Id., 462-463.

(10) Next, on this same tape, Grosser embellished his naked idea that Range was a killer by generating an egregious response from Ellington. This he did by asking: "what Litho thought, that Buddy would be in on it too." And, by asking Ellington if he thought Ellington had actually "killed [Jay] Jackson who was at the time missing." Ibid.

Again the critical ruling made by the trial court with reference to our hearsay and confrontation objections to this evidence was that this evidence was admissible under **Bourjaily**. As the trial Court put it, there was a conspiracy here and these statements were made in furtherance of the conspiracy (Tr., p. 916-918.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

A central point behind all of the above selected segments of the Record is well made even if we assume Jay Jackson's earlier testimony (**Jay Jackson,** at Tr., 33-34 and 37-38) sufficiently satisfied "the evidentiary standard" for the admission of 801(d)(2)(E) evidence. This would only be the beginning rather than the end of the required process. This follows because (as argued below) the naked proof of the existence of a foundation conspiracy surely would not authorize the blanket admission of every statement made to Ellington by Grosser and every response made by Ellington that may have occurred "during the course" of

such conspiracy. And, this without regard to whether it furthered the conspiracy or not. This tenet as well was violated.

Now we are willing to concede that more probable than not all of the statements isolated above were admissible against Ellington. However, as against Range they could only be admitted if there was substantial evidence of the charged conspiratorial relationship between the non-testifying declarant (here, Ellington) and Litho Range, who was devastated by the statements. Additionally, to be admissible the statement must also have been made in furtherance of such conspiracy.

We will grant also that the Court's prerogative may have allowed him to fully consider the statements themselves in determining whether they were probative of the existence of a conspiracy. But the right given the Judge to so consider such evidence, in determining admissibility, is hardly an indication that all statements made by the declarant are automatically rendered admissible as proof of guilt of the charged conspiracy. The

obvious reason this is so is because, as contended above, 801(d)(2)(E) only requires a preponderance of the evidence. To prove guilt requires evidence that reaches a higher standard.

Postured by the various cogent analyses made below (in Arguments No. I, II & III), any doubt as to whether Litho Range was truly victimized, both, by the admission and the jury's unrestricted use of evidence admitted under Rule 801(d)(2)(E) is obviously beyond dispute. Even this wrong was magnified when the trial Judge refused to limit the proffered evidence to a proper purpose. This fact is very readily gleaned from the following segments of the government's summation. Here counsel-opposite argued:

> Real good proof that Litho Range is the supplier comes from Litho Range's customer, Eugene Ellington, who, while he's being tape recorded on July 13th when he's selling dope, says that, yes, Litho is a supplier. That tape went as follows: Walter said -- he made a quote of another doper -- he said, oh, yeah, I heard that Litho got his stuff from Butch.

And Genie says, no, no, please, man. He says, no, Butch owes Litho so much money it ain't even funny.

* * *

On September 25th, Walter Grosser says to Genie ... did Jay give all your money to Litho? And Eugene Ellington tells you no. He says, I owe that man $182,000, his supplier.

On October 11th, Gene Ellington calls Walter. He's talking to him. He says, I was talking to Litho last night about you, man. Now, if you weren't engaged in the heroin business together, why would you be discussing the trustworthiness of one of your customers?

And what you learn is that Litho Range told Genie Ellington they felt Walter Grosser was a snitch working for the federal government.

But Gene Ellington didn't believe that, no, he got Walter out there for a whole day digging. And you hear on the tape that he confirms what Walter said, they were out there digging looking for this heroin that they thought Jay Jackson had stolen.

> And Gene Ellington says, I told Litho, he cool like a MF shit, you know. But Litho is still leery of Walter and that's why we don't have tape recordings of Litho Range's voice because Litho Range is a much more cautious man than Eugene Ellington.
>
> You hear Walter Grosser speculating, he says, talking about Jay Jackson, he says, why did you steal all that man, it was in two Gator Aid bottles?
>
> No, he says, it ain't glass. It's in two coffee cream jars.... Id., 36-38. (Emphasis supplied.)

Obviously, any argument that the jury regarded the content of these various comments made by (as well as those merely attributed to) Ellington, Jackson and Grosser as anything other than substantive proof of Litho Range's guilt would not only be farfetched, it would also be glaringly specious.

Also, an argument can be made that the wrong done Range by the admission against him of these various incriminating statements, most of which were cleverly and intentionally elicited

by Grosser from Ellington, can be analogized to a **Bruton v. United States, 391 U.S. 123 (1968)** violation. For if **Bruton** stands for anything it is that a confrontation violation occurs when a non-testifying co-defendant's statement, which incriminates or inculpates an accused, is admitted into evidence in a joint trial. Clearly, these various statements and comments made by, and attributed to, Ellington must be regarded as being extremely inculpatory. This is so because they not only incriminated Range, but also because the Government wilfully intended that the statements elicited from Ellington should be fairly understood as incriminating Range. This makes the lack of an opportunity to cross-examine Ellington, as to these conspicuously prejudicial statements, an undeniable due process violation.

On the proof beyond a reasonable doubt issue, we start with the fact that the most critical evidence involving Litho Range that can be said to bear even slightly thereon would be the various statements supposedly made by Eugene Ellington in conversations

with the informant, Walter Grosser, about Litho Range.

Apart from the serious credibility problems one naturally has with Jay Jackson's worth as a person and as a credible witness, his proof at best would only show a buyer-seller relationship between Eugene Ellington and Litho Range. And, it could not be clearer that such a relationship would simply not be conspiratorial. See **Direct Sales Co. v. United States, 319 U.S. 703, 709, 711-712 and n. 8 (1943)**. Indeed this very point was well made in **United States v. Jerome, 924 F.2d 170 (9th Cir. 1991)**, where the Court ruled, in the context of a CCE (21 U.S.C., §848) prosecution, that a supplier is not properly regarded, by virtue of that fact alone, as being a part of his customer's business.

(I) Due Process Is Denied An Accused When The Court, Without Any Expressed Evaluation Of The Various Alternative Methods Of Qualifying Evidence Proffered Under Favor Of Rule 801(d)(2)(E), Rotely Opts To Preliminarily Admit

Such Proof Pending A Ruling As To Admissibility At The Close Of The Government's Case.

Granted, the trial Court must be regarded as having the prerogative of admitting some of the assailed evidence "subject to a later demonstration of ... [its] admissibility by a preponderance of the evidence", **United States v. Vinson, 606 F.2d 149 (6th Cir. 1979)**. Here it should be noted that once the Court admits the evidence preliminarily, the odds against the Court later finding a failure to justify its ultimate admission is so overwhelming as to be impossible. This is so because the Court must be credited with being aware that any ruling against admission would almost surely require a mistrial for the beneficiary of the ruling.

Simply put, the reservation until the close of the government's case of a ruling on the existence of the conspiracy predicate for admission (required by 801[d][2][E]), invariably and necessarily, negatively influences the favorable consideration the Court might otherwise give to the "in furtherance" aspect and

during the course of requirements of Rule 801(d)(2)(E).

Another point we are here contending for is that even if one assumes a conspiratorial relationship was established as between Ellington and Range, this finding simply would not automatically qualify the admission of any and all statements shown to have been made, or said to have been made, by Ellington in conversations actually had (and assertedly had) with the hired-witness Grosser. Because the petitioner Range's "substantial rights" were perforce adversely affected by the conditional admissibility method used to determine admissibility, a due process issue surfaces.

Here it should be understood we only listed above some of the various statements assertedly made by Ellington to Grosser that were admitted as proof of the conspiratorial relationship required by Rule 801(d)(2)(E). It is, of course, undeniable that these hearsay statements and others were considered by the jury as substantive proof of guilt (id., 801[C]). As to the admission of these statements it is our considered position that there is literally

no way it can be said that any of these statements (particularly those that were the product of Grosser's instigation and stimulation) can be defended as being anything other than a rank violation of Range's confrontation rights.

(II) Due Process Is Denied When The Court Admits Considerable Hearsay Evidence, Which Evidence Did Not Satisfy The Conditions Precedent To Admission Required By Rule 801 (d)(2)(E).

Granted the trial Court does have considerable discretion with reference to the order of proof regarding the admission of evidence under favor of **Rule 801(d)(2)(E), Federal Rules of Evidence**. However, this surely does not mean that in all cases only one alternative should invariably be used. Nor does it mean that it is not even possible that a valid argument could be made to the effect that the trial Court should have used a different method and that his failure to do so prejudiced the accused.

Now we fully agree that **Bourjaily v. United States, 107**

S.Ct. 2775 at 2783 (1987), did tend to indicate that a Court may allow hearsay to justify its own admission. However, as was argued to the District Court this Court left open the question presented here, i.e., whether the determination required by Rules 104 and 801(d)(2)(E) could be made solely on the basis of what would otherwise be purely hearsay evidence (ibid).

(A) Various statements made by an asserted co-conspirator and Ellington, those that were tape recorded (and played for the jury) and those that were simply testified to by the witnesses Grosser and Jackson, were not properly admitted against the petitioner.

At the outset we recognize, as we are sure the Court will, that the co-conspirator exception to the hearsay rule, although not actually an exception because of the wording in Rule 801(d)(2)(E), relates to issues that are distinct from the crime of conspiracy. Granted, under the co-conspirator evidence rule (i.e., 801 [d] [2][E]), particularly when considered in the light of **Bourjaily**, a trial court may consider the statements seeking admission themselves as well as independent evidence in determining

admissibility. Id., 185, 2783.

However, and this point seems clearly to have been ignored here, **Bourjaily** left open a critical question present in this case. Simply put, that question is: whether a trial court can make the required determination solely on the basis of what would otherwise be inadmissible hearsay. See **Bourjaily, 107 S.Ct. at 2782**. Also, **Bourjaily** simply did not eliminate the requirement that the conspiracy required by 801(d)(2)(E) must still be shown by a preponderance of the evidence to exist.

In **United States v. Mack, 837 F.2d 254 (6th Cir. 1988)**, it should be noted that the Court below made the very critical point, relying on **Bourjaily**, that there is still a requirement that the government must prove "by a preponderance of the evidence that a conspiracy exists" before admitting such proof. **Mack, 837 F.2d, at 258**. The Tenth Circuit, in **United States v. Pinto, 838 F.2d 426 (10th Cir. 1988)**, and the Seventh Circuit in **United States v. Pitts, 840 F.2d 368, 371 (7th Cir. 1987)** likewise

credited the fact that the admissibility of statements under favor of Rule 801(d)(2)(E) is dependent upon proof (by a preponderance of the evidence) that the defendant and the declarant were members of the same conspiracy. And, admissibility is also dependent upon equally cogent proof that the statements were actually made in furtherance thereof. Id., 433.

Based on these insuperable tenets, we fully contend the admission of the assailed evidence[3] cannot be squared with the precise holding made in **Bourjaily**, that the trial Court "*must be satisfied that the statement actually falls within the definition of the rule*. There must be evidence that there was a conspiracy involving the declarant and the non-offering party, and that the statement was made 'in the course and in furtherance of the conspiracy.'" *Id., 1278.* (Emphasis supplied.)

Whether the Government's proof satisfied the condition for

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[3] Our reference here is to the statements listed above, pp. 7 to 12 of this Petition.

admission required by Rule 801(d)(2)(E) was a question of law and as such was subject to *de novo* appellate review. With this as the standard, there was no reason for the Sixth Circuit to defer as it did to the ruling made by the trial Court admitting the taped, and other, Grosser-Ellington conversations in their entirety. See **United States v. Silverman, 861 F.2d 571, 576-577 (9th Cir. 1988).** This cogent point, in our judgment, was made most clear in **Bourjaily**. Our reference here is to this Court's statement that 801 (d)(2)(E) statements must be regarded as being presumptively unreliable. **Bourjaily, 107 S. Ct. at 2781.**

(B) The "in furtherance" requirement of Rule 801(d)(2)(E) is not met by proof of idle chatter and the like.

Clearly among the various problems surfacing here, and that must be specifically addressed, is the issue as to whether a 801(d)(2)(E) conspiracy had been shown by a "preponderance of the evidence" to exist as between Range and Ellington, as is required. And, assuming it can be said such a conspiracy was

shown, the issue then is whether the statements made by Ellington were in fact made "in furtherance" thereof as the Rule likewise requires.

On the other hand, with reference to the hearsay statements themselves, which were admitted over objections as proof of the matters asserted (Rule 801[C]), the most that can be said for these various statements is that they are more easily viewed as casual comments and narrative descriptions (by Ellington). None of them could possibly further any of the conspiratorial objectives alleged in the indictment. Additionally, these statements, which more often than not were the result of clever interrogation and specific elicitation by the undercover "agent," at most should not have been regarded as anything other than idle chatter. See, e.g., **United States v. Phillips, 664 F.2d 971** (5th Cir. 1981). Also see **United States v. Green, 600 F.2d 154, 157-158** (8th Cir. 1979); and **United States v. Fielding, 645 F.2d 719, 726** (9th Cir. 1981).

Thus it is obvious that if it is the law that any statement made by one shown to be a conspirator is automatically admissible, then the central requirement of Rule 801(d)(2)(E) -- that the statement must also be *in furtherance* of the conspiracy -- would lack any legal significance. For, to be admissible, all the prosecution would be required to show is that a particular statement was made by a co-conspirator and it would automatically be admissible against all members. Indeed, this appears to have been what occurred here. For our trial Court simply credited the fact *of his determination* that a conspiracy existed as providing a sufficient basis for him to retroactively validate the admission of *everything* that was said on the tapes and otherwise by Grosser (the undercover informant) and by Ellington (the asserted co-conspirator). (See Tr., 946.)

Under the theory of exclusion, here being contended for, idle chatter, mere chitchat, casual admissions of culpability *and* even wild assertions (including noise and static), such as that

which typifies boastful oratory of the like engaged in by Ellington, would automatically be regarded as inadmissible. See **United States v. Doerr, 886 F.2d 944, 951-952 (7th Cir. 1989)** and **United States v. Paone, 782 F.2d 386 (2d Cir. 1986)**.

In our judgment, the statements being assailed here did not qualify for admission for the further reason that, simply put, they are too insufficiently reliable to be considered as proof even that they were uttered and clearly should not qualify as proof of the matter asserted. Here our reference is to those statements that were not on the tapes.

Here the Court is referred to the cogent observation by one Court that:

> The requirement that the statements have been in furtherance of the conspiracy is designed both to assure their reliability and to be consistent with the presumption that the co-conspirator would have authorized them. The requirement is not satisfied by a conversation such as the one here, which amounted to no more than idle chatter.

United States v. Lieberman, 637 F.2d 95, 103 (2d Cir. 1980).

Significantly, this same point was well made in **United States v. Eubanks, 591 F.2d 513, 520 (9th Cir. 1979)**, where the Court reasoned that for declarations to be admissible as having been made in furtherance of a charged conspiracy, they must have been intended to further the common objective of the conspiracy.

Additionally, many of the statements admitted fell into the category of being mere "conversations", or they were "merely narrative declarations," which were beyond the scope of any conspiracy that the asserted declarant was a member of. See **United States v. Phillips, 664 F.2d 971 (5th Cir. 1981)**, where this point about "idle conversation" (id., 1027) and "retrospective comments in conversations about past events" (id., 1026) not being admissible, was expressly credited. Also see **United States v. Moore, 522 F.2d 1068 (9th Cir. 1975).**

In our judgment, not unlike the situation in **United States v. Moore,** referred to above, the prosecutor has so far been unable to even suggest a reasonable interpretation of "... [Ellington's

rambling statements about Litho Range], or the facts surrounding ... [their] making that could reasonably ... lead to the conclusion that the[se] statement[s were] somehow 'in furtherance' of the [charged] conspiracy" (id., at 1077).

(III) Due Process Was Denied When The Trial Judge Refused To Instruct The Jury That Evidence Admitted Under Favor Of Rule 801(d)(2)(E), Could Not Be Regarded As Substantive Evidence Of The Petitioner's Guilt Of The Conspiracy Charge.

As is easily distilled from the several arguments made above, there is a serious distinction between the significance of evidence admitted under Rule 104 in order to satisfy the requirements of Rule 801(d)(2)(E) *and* the quantum of evidence required to prove the Title 21 U.S.C. §846 crime of conspiracy. To begin with, in the former instance, we are only talking about the admission of evidence as prima facie proof of a conspiracy; in

the latter instance we are talking about proof of guilt itself. In one instance the burden of proof is the preponderance of the evidence whereas the burden of proof is beyond a reasonable doubt with reference to the conspiracy offense itself.

Now, the government has argued, and will probably argue again, that evidence admitted to satisfy the condition precedent requirements of Rule 801(d)(2)(E), can also be regarded as substantive proof of the charges themselves.

Here, it is worth repeating that **Bourjaily** made the very significant point that "the evidentiary standard [for the admission of evidence under 801(d)(2)(E)] is unrelated to the burden of proof on the substantive issues" (**107 S. Ct. 2778**). Also, it should be noted that while we have again cited several other cases to support this thesis, these cases will again be ignored by counsel opposite.

So postured even if the evidentiary standard for the admission of the challenged evidence was properly met, it is a *non sequitur* to argue, because it does not follow, that the defendant

was therefore proven guilty of the charged conspiracy offense beyond a reasonable doubt. Again, the point to be made is that for a considerable quantity of the evidence here being assailed to be admissible, under Rule 801(d)(2)(E), the proof had to show the existence of a conspiracy that included the declarant (Eugene Ellington) and Litho Range, the party against whom the evidence is admitted. With reference to the Title 21 Conspiracy offense, the proof required the establishment of that relationship beyond a reasonable doubt. See, **United States v. Gil, 604 U.S. 546 (7th Cir. 1979)** and **United States v. Trowery, 542 F.2d 623 (3d Cir. 1976)**.

A further aspect of the distinction (between the admission of statements under Rule 801[d][2][E] *and* the quantum of proof required for a conviction) is the insuperable fact that a member of the charged conspiracy (here, Ellington and/or Jay Jackson) may not make another person a member simply by saying so. In a nutshell, Litho Range cannot be said to have been proven to be

guilty simply because he was said by Ellington to have been his partner.

Distilled, what we are saying is that while the existence of a conspiracy, in an evidentiary sense, can be based on declarations admitted under Rule 801(d)(2)(E) along with other evidence showing the statements and acts of all the alleged conspirators, "a particular defendant's membership in ... [such] conspiracy, if any, must be based on evidence limited to that defendant" **United States v. Ortiz, 883 F.2d 515, 521 (7th Cir. 1989)**. This being so, it follows that the Court of Appeals was required to review the sufficiency of the evidence with reference to Range's conviction solely on the basis "of what he did or said" (ibid).

Stated another way, the critical point in this circumstance seems clearly to be that Range could properly be convicted of the crime of conspiracy only on the basis of proof of his own conduct and acts. The proof even here must prove his *participation* in the conspiracy when at least one of the overt acts charged in the

conspiracy was committed by a co-conspirator. See **United States v. Brown, 335 F.2d 170, 172 (2d Cir. 1964)**. Also see **United States v. Ortiz, 883 F.2d 515, 520 (7th Cir. 1989)** and **United States v. Esparza, 876 F.2d 1390, 1393 (9th Cir. 1989)**.

The cogency of the points here being made become even more manifest when one realizes that if a jury is only permitted to find that the membership/participation element has been satisfied by the defendant's own actions and words, *then* clearly the fact that Range himself did nothing that qualified him for a conviction of the charged conspiracy really dictates the required position this Court must surely take with reference to the particular arguments made in this segment of our Petition.

Also, as to our request for the instruction centralized under the topic here being discussed (Tr., 917-919, & 1046), the following quote from the Seventh Circuit's Opinion in **Ortiz**, rendered after **Bourjaily**, not only captures one of the arguments being advanced by Range, if it is valid it shows the extent to

which Range was victimized by the Court's unwillingness to give our requested charge (id., 1046). Here the Seventh Circuit wrote:

> ... the Court [in **Bourjaily**] did not say that proof of one's membership in a conspiracy *for the purpose of a conviction* may be based on evidence other than or in addition to that defendant's own statements and acts. Indeed, the Court suggested that this was not the case since the standards for admissibility of evidence and for a criminal conviction are 'unrelated.' Ibid. The standard of proof was not in issue in *Bourjaily*, only the standard for admitting evidence.

Ortiz, 883 F.2d, at 520.

Having taken the above position, the Seventh Circuit (in a position that markedly contrasts with that taken by Judge Manos in rejecting our requested instruction [Tr., 917-18]), then concluded that:

> Accordingly, the rule in this circuit remains that in determining whether or not a defendant was a member of a conspiracy the jury must be instructed that it can only consider evidence of what the defendant did

> or said. *Another member of a conspiracy may not make the defendant a member of the conspiracy simply by saying that he or she was a member.* Obviously, determining whether or not a defendant was a member of a conspiracy must follow a finding that a conspiracy existed. And determining whether or not a conspiracy existed can be based on evidence of acts of or statements by all alleged conspirators. However, a particular defendant's membership in the conspiracy, if any, must be based on evidence limited to that defendant.

Ortiz, 883 F.2d, at 520.

In this case clearly the informer, Walter Grosser, by engaging Ellington in conversations was doing the Government's bidding. This being so, the jury's exposure to his statements, which sought responses to his most inquisitive references to Range, and which generated responses that either, accused Range of criminal conduct or put his character in issue, cannot possibly be defended. Nor can it be shown that Ellington's responses to these questions were made "in furtherance of" any possible

conspiratorial relationship that may have existed between Ellington and Range. **See United States v. Ferra, 900 F.2d 1057, 1059 (7th Cir. 1990).**

Now, the Government may offer some *belated* suggestion that this evidence was admissible for some limited purpose. However, any failure by the Government to reckon with the fact that when this evidence was offered and admitted it was as substantive proof, will make our point. Indeed, this was the *sole* basis for its admission. This follows because the Court's refusal to limit this evidence, as it was requested in writing to do, leaves no other conclusion available. (Tr., Vol. 7, pp. 916-918 and 1046.)

Simply put, nothing was said by the Government or the Court that in any way limited, or conditioned, the admission of any of the assailed evidence. The upshot of this is that the jury having heard this evidence without any admonishment from the Court perforce regarded the evidence itself *as proof of the matters*

asserted -- i.e., as substantive evidence. In other words, it follows here that because the jurors were not enjoined from making substantive use of statements made by *Grosser and Ellington* against Range, it must be assumed they did so. Clearly any such use would be a violation of Range's confrontation rights.

Still another point to be made here credits the fact that limiting instructions have been recognized as the only way to deal with the tape recordings in the face of a confrontation challenge. See **Lee v. McCaughtry, 892 F.2d 1318 (7th Cir. 1990).** Also, it should be emphasized that this Court is yet to retreat from its central holding in **California v. Green, 399 U.S. 149 (1970).**

With the above quotes as givens, the fact that the jury was in no way advised as to any restrictions on their use of the conversation heard on the tapes, which in all instances did not contain any participation by Litho Range, truly puts this issue in context. For if a constitutional issue emerges as to whether even a limiting instruction is adequate in situations of this ilk, then

surely any conclusion that the admission of this evidence can be validated on general principles would truly be farfetched. See **United States v. Keplinger, 776 F.2d 678, 695 (7th Cir. 1985)**. Cf., **Richardson v. Marsh, 481 U.S. 200 (1987)**, which likewise placed its emphasis on the presence of limiting instructions of the type missing here.

(IV) The Petitioner Was Denied The Right Of Confrontation When His Counsel Was Denied The Right To Make Effective Use Of The Contents Of A Motion To Suppress The Confession Made By One Of The Government's Chief Witnesses, Which Contents Would Have Tended To Impeach The Testimony Of Several Government Witnesses.

First off, the need for the testimony of Jay Jackson's counsel relates to the fact that his evidence indisputably bore, not only, on the credibility of his client, but also on the testimony of various

agents.

Here the Record shows that Jay Jackson, following his arrest and before he was converted into a government witness, first sought to gain his release on bail in spite of a detention order. Additionally, through his counsel Jay Jackson filed a Motion to Suppress his confession.[4] In this Motion several serious allegations were made by his appointed counsel. Some of these allegations specifically and seriously contradicted testimony rendered by Jay Jackson and by Agent Moritz.

Counsel for Range then sought to question Jackson's attorney concerning the allegations made by him in various documents prepared by him. Significant here, Jackson's counsel (claiming the attorney/client privilege) actually refused to testify. (Tr., Vol. 6, 987.)

In condoning this refusal to answer questions even the

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[4] This document was referred to, and admitted, as defendant Range's Exhibit "A" (**Coticchia**, at Tr., Vol. 7, p. 920).

Court considered valid, the Court first indicated the defense would be allowed to show the presence of certain segments of the statement. (Tr., Vol. 7, p. 922.) However, once counsel sought to do this, the Court abruptly changed pace and outright refused to allow counsel to expose serious contradictions between Jackson's testimony and what he alleged in his Motion to Suppress the confession made by him. It was this confession that he and his counsel had tried to convince the Court had been obtained in violation of his rights.

Our point here is emphasized in the following segments of the Record:

MR. WILLIS: I move the admission, your Honor, of the exhibit.

THE COURT: To the limited extent?

MR. WILLIS: Yes.

THE COURT: It will be admitted only to the portion indicated by the Court.

* * *

MR. WILLIS: May I publish those segments to the jury?

THE COURT: Let's see what you're going to publish.

* * *

THE COURT: I have admitted this. And we have now before the jury that there was a statement made, but it is not admitted in any way as to the truth of that statement or otherwise. Is that ... what is it you want to publish?

MR. WILLIS: I want to publish this segment right here, that's one; and the segment right here, ... that's two.

THE COURT: *Read it into the record.*

MR. WILLIS: Agent Moritz told Jackson that if he cooperated and testified, he would get a break on his sentence. He was told that being only 21 years old, ten years was a long time to spend in jail. He was also warned that if he didn't cooperate and ended up in the penitentiary, at his

young age, he would end up being some prisoner's bitch. The agents told Jackson if he cooperated, they would help him. Jackson was told that if he thought he was tough, the agents would put him in the same cell with Ellington.

Now, talking about Moritz --

THE COURT: Just a second, you will not read that because I indicated to the jury that this isn't being offered to prove the truth of the matter asserted; this is being offered solely to show that the statement was coerced. You've told them that. The jury knows that this was offered to show that the statement was coerced and therefore it should be suppressed. That's how the jury is going to know.

This goes to the truth of the matter asserted, these DEA agents said this. That's my ruling.

MR. WILLIS: Could I proffer this into the record?

THE COURT: Yes, you can proffer it.

MR. WILLIS: My understanding is that I would be allowed to show that Agents Ventura and Moritz were the persons who Mr. Coticchia represented to the Court had said these specific things to him. That was the basis of my inquiry of Mr. Jackson. And I think that this is a prior inconsistent statement which is admissible under the rules. And *I feel I have a right to specifically inform the jury as to exactly what it was that was represented as having taken place in connection with the coercion, and that's all I wanted to do.*

He's mentioned Moritz and Ventura and being a bitch. And that's -- he denied that on the witness stand. And *he denied Moritz and Jackson -- and Moritz and Ventura were the ones who told him they would put him in the cell with Litho Range.*

I believe I have a right to show that Coticchia reflected

> *a contradiction to that testimony in his motion that he filed with the Court*, and I wanted to publish those things to the jury at this point.

(Tr., Vol. 7, pp. 922-925.) (Emphasis supplied.)

The right of an accused to impeach any witness who testifies against him is really beyond dispute. Clearly then, Litho Range had a right to present evidence, which if believed, would have tended to show that various witnesses lied in their evidence. Here our reference is to the testimony by Jackson and the Federal agent that they did not exert illegal pressure in an effort to convert him into a federal witness.

Since information supportive of our thesis was formally filed with the Court, the conclusion that the defense could not make full use of this evidence is, in our judgment, indefensible.

(V) The Evidence Here Was Insufficient To Support The Defendant's Conviction For The Charged Conspiracy (21 U.S.C. §846).

(A)

The sum and total of the Government's proof of Litho Range's alleged guilt came from the testimony of two witnesses. One of these was Walter Grosser, the government's paid-informant. The other was Jay Jackson, a co-defendant on the indictment. The testimony of Jay Jackson was likewise purchased by the Government with the consideration involved in the sweetheart deal made with him after (according to him) he had been abused by the agents and otherwise denied his right of counsel.

The testimony provided by Grosser, who had no personal dealings with Range involving drugs or drug related matters, included his revelation of the contents of numerous conversations he supposedly had with the co-defendants in this case. All of this testimony was objected to. Indeed, as discussed earlier (*Ante*, pp. 7-12), this evidence clearly had such significant persuasive force that it can hardly be denied that it clearly influenced the guilty

verdict issued in this case against Range.

This is so *despite* the indisputable fact that the testimony provided by, both, Walter Grosser and Jay Jackson was internally inconsistent and contradictory. Additionally, even from a reading of the cold Record, it is at once apparent their evidence was of questionable credibility. Simply put, the government had to know then, as it surely does now, there is no way to defend the blanket admission of the entirety of all of the conversations Grosser had, or testified he had, with Ellington in which these gross references to Range were made. Because this is so, first off the Government will surely bombard us with an array of equally unconvincing (and outright specious) arguments in favor of admission; then the Government will surely argue that in any event admission was harmless. Of course, the farfetchedness of this argument likewise should magnify the cogency of our thesis in this regard.

This follows because the obviousness of the fact that the government had no business offering this evidence, when coupled

with its less than forthright method of not only creating, but in actually getting this evidence before the jury, will surely belie any contention that its case against Range was overwhelming. And, for that reason the wrong involved was harmless.

Still, the bottom line is that Litho Range was not shown beyond a reasonable doubt to have conspired with anyone. This conclusion is really augmented by the lack of any proof he was involved in any of the transactions relied on by the government. The question then is: was it reasonable for the jury to credit Jay Jackson's naked, totally uncorroborated, self-serving testimony that Litho Range, on three or four occasions had brought a pound of heroin to the house, which was then said to have been delivered to Eugene Ellington?

Now, apart from the credibility problems one would naturally have with Jay Jackson's testimony, the fact that he was thoroughly impeached to the extent that he was, surely makes the jury's acceptance of his testimony most tragic. Additionally, it is

indisputable that Jay Jackson never testified he actually inspected what he described, in his evidence, as heroin that was supposedly delivered by Range to Ellington. The upshot of this is, there is nothing in Jackson's evidence that could have provided sufficient foundation for the jury to conclude beyond a reasonable doubt that heroin was delivered by Range to Ellington -- if indeed anything at all was delivered. Postured by the above evidence, it is being contended that *even if* this evidence is considered in the light most favorable to the government, *and even if* the government is given the benefit of any and all the reasonable inferences that can arguably be drawn from his testimony, still there is simply no way any reasonable jury should have reached the conclusion beyond a reasonable doubt that Range was guilty of the criminal offense of having *conspired* with Eugene Ellington.

This point is also well made when one looks for proof Litho Range actually *participated* in any conspiratorial relationship with Ellington. This is especially so since actual *participation* is

indeed an element of the conspiracy charge. And, proof of a particular individual's participation as a member of the charged conspiracy can only be established on the basis of his "actions and reactions to the circumstances" **United States v. Barrett, 933 F.2d, 355 at 359 (6th Cir. 1991).** Also see **United States v. Garcia, 655 F.2d 59 (5th Cir. 1981)**, which this Court relied on for the above quote from **Barrett.**

Next, we repeat here the contention made to our Circuit that at most any relationship between Litho Range and Ellington could only be regarded as that of buyer and seller. For clearly it cannot be said they were fellow conspirators with a common goal as is required. See **United States v. Meyers, 646 F.2d 1142 (6th Cir. 1981), United States v. Johnson, 889 F.2d 1032 (11th Cir. 1989), United States v. Butler, 885 F.2d 195 (4th Cir. 1989)** and **United States v. Ford, 324 F.2d 950 (7th Cir. 1963).**

CONCLUSION

In the government's opposition to our post-trial Motion For

Judgment Of Acquittal, the government made the argument that "statements from Ellington as assertions made by Range ... directly related to the productivity, function of the conspiracy and members of it were properly admitted," id., p. 4. Also, counsel stated these statements "established the status of the defendant with respect to the conspiracy and how other conspirators were to conduct themselves in their activities" (ibid). This assertion should be compared with the statement made in **Bourjaily v. United States**, that a court must be satisfied that the [801(d)(2)(E)] evidence falls within the definition of the Rule. **Id., 107 S.Ct. at 2778**. And that statements of the ilk here involved are presumptively unreliable. Id., at 179.

Also, counsel made (in this same Brief, at p. 4) the argument that "evidence admitted under Rule 801(d)(2)(E) constitutes substantive evidence of the defendant's guilt". Obviously only a prosecutor would argue, as our prosecutor obviously does, that the "in furtherance" limitation on 801(d)(2)(E)

evidence should not be taken seriously. And, that all the government need show is that one proven to be a conspirator *mentioned* some other person in conversation with a federal agent and the person mentioned can automatically be regarded as a conspirator.

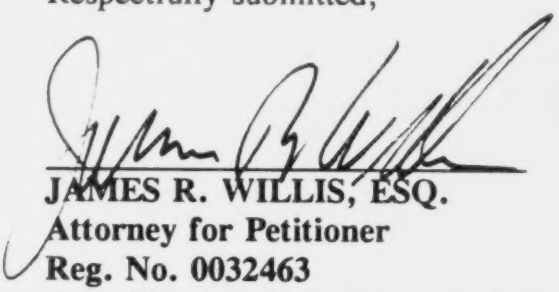
The lack of any authority for such a position makes it clear that argument will obviously not be made in the government's Response to our Petition. Nor will the government argue that 801(d)(2)(E) evidence is admitted as substantive proof.

Once it becomes apparent that in the various instances when Ellington's mentioning Range's name in conversations with the government's informant was admitted, Ellington must be regarded as a non-testifying declarant. The point being made here is that statements of this type invariably prejudice any non-declarant co-defendant. Clearly Range must be viewed as a non-declarant co-defendant. When viewed in that sense, clearly we have a **Bruton** problem here. See **Bruton v. United States, 391 U.S. 123, 126**

(1968). Also see **United States v. Basey, 816 F.2d 980, 1004 (5th Cir. 1989)**.

For all of the reasons argued above the conviction herein should be reviewed. Further, to the extent certain issues are credited, the District Court should be required to enter final judgment for the petitioner.

Respectfully submitted,



JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Reg. No. 0032463
Suite 350, Courthouse Square Bldg.
310 Lakeside Avenue, NW
Cleveland, Ohio 44113
(216) 523-1100